

<sup>2</sup> 5 U.S.C. § 8101 *et seq.*

## **ISSUE**

The issue is whether appellant has met his burden of proof to establish greater than 34 percent permanent impairment of his left lower extremity, for which he previously received a schedule award.

## **FACTUAL HISTORY**

This case has previously been before the Board.<sup>3</sup> The facts and circumstances of the case as set forth in the Board's prior decision are incorporated herein by reference. The relevant facts are as follows.

On September 26, 2014 appellant, then a 54-year-old city carrier, filed an occupational disease claim (Form CA-2) alleging that over 30 years as a carrier, he developed degenerative joint disease in the left knee due to factors of his federal employment.<sup>4</sup> OWCP accepted his claim for left knee medial osteoarthritis. It paid appellant wage-loss compensation on the supplemental rolls until September 23, 2014 when appellant returned to full-time, modified-duty work.

On July 23, 2015 appellant filed a claim for compensation (Form CA-7) for a schedule award.

By decision dated March 15, 2016, OWCP granted appellant a schedule award for 20 percent permanent impairment of the left lower extremity. The schedule award ran for 57.6 weeks from August 12, 2015 through September 18, 2016. The schedule award was based on the February 22, 2016 report of Dr. Arnold T. Berman, a Board-certified orthopedic surgeon serving as an OWCP district medical adviser (DMA), who opined that pursuant to the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*),<sup>5</sup> appellant had 20 percent left lower extremity permanent impairment based on his diagnosis of left knee osteoarthritis.<sup>6</sup>

On October 31, 2016 appellant underwent left knee unicondylar arthroplasty performed by Dr. Jacques S. Van Ryn, a Board-certified orthopedic surgeon. The operative report noted a diagnosis of end-stage medial arthritis of the left knee. On February 8, 2017 appellant began to work part-time, modified duty.<sup>7</sup>

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<sup>3</sup> Docket No. 20-0311 (issued July 8, 2020).

<sup>4</sup> OWCP assigned the present claim OWCP File No. xxxxxx321. Appellant subsequently filed a traumatic injury (Form CA-1) claim for a left leg and head injury related to an October 3, 2017 employment incident. OWCP assigned that claim OWCP File No. xxxxxx721 and accepted it for left leg contusion and head laceration. It administratively combined appellant's claims with the current claim serving as the master file.

<sup>5</sup> A.M.A., *Guides* (6<sup>th</sup> ed. 2009).

<sup>6</sup> In a February 22, 2016 report, Dr. Berman utilized Table 16-3, *Knee Regional Grid*, page 511, and assigned a class of diagnosis (CDX) of primary knee joint arthritis with a default value of 20 percent.

<sup>7</sup> OWCP placed appellant on the periodic rolls, effective December 11, 2016.

On May 15, 2017 appellant filed a Form CA-7 claim for an increased schedule award.

Appellant submitted a June 6, 2017 impairment rating report by Dr. Neil Allen, a Board-certified neurologist and internist, who noted that appellant's claim was accepted for left knee degenerative osteoarthritis and that appellant had undergone left knee arthroplasty on October 31, 2016. Dr. Allen recounted that appellant currently complained of left knee pain, weakness, and swelling. Utilizing the diagnosis-biased impairment (DBI) method to determine permanent impairment, he referenced Table 16-3 (Knee Regional Grid), page 511, of the A.M.A., *Guides*, and noted a CDX for appellant's status post tibial osteotomy resulted in a CDX of 3 with a default value of 37. Dr. Allen explained that the condition of status post tibial osteotomy most closely resembled a unicondylar arthroplasty. He assigned a grade modifier for functional history (GMFH) of 2. Dr. Allen indicated that a grade modifier for physical examination (GMPE) and a grade modifier for clinical studies (GMCS) were not used because they were used in the class placement. He utilized the net adjustment formula,  $(GMFH - CDX) = (2 - 3) = -1$ , and calculated a net adjustment of -1, which moved the rating to the left and resulted in a final permanent impairment rating of 34 percent permanent impairment of the left lower extremity.<sup>8</sup>

In an April 20, 2018 report, Dr. Arthur S. Harris, a Board-certified orthopedic surgeon, serving as OWCP's DMA, reviewed Dr. Allen's June 6, 2017 impairment rating report and concluded that appellant had 34 percent permanent impairment of the left lower extremity. He noted that appellant had been assigned a CDX of 3 for having a fair result following the unicondylar knee arthroplasty with documented motion deficits. Dr. Harris explained that the A.M.A., *Guides* did not allow for the use of the range of motion method as an alternative rating method for the diagnosis of status post unicondylar knee arthroplasty.

By decision dated September 18, 2018, OWCP granted appellant a schedule award for 34 percent permanent impairment of the left lower extremity. The award ran for 97.92 weeks from June 6, 2017 through April 22, 2019. The schedule award was based on the June 6, 2017 report of Dr. Allen and the April 20, 2018 report of the DMA Dr. Harris.

On April 23, 2019 OWCP requested a supplemental opinion from Dr. Harris, which addressed appellant's prior schedule award of 20 percent permanent impairment of the left lower extremity.

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<sup>8</sup> Appellant retired from federal service, effective February 28, 2018.

In a May 1, 2019 addendum report, Dr. Harris indicated that because appellant was previously awarded 20 percent permanent impairment for his left lower extremity, he was entitled to an increase of 14 percent permanent impairment for a total of 34 percent permanent impairment of the left lower extremity.<sup>9</sup>

On September 16, 2020 OWCP forwarded appellant's case record back to Dr. Harris, the DMA, for clarification regarding whether the 34 percent left lower extremity permanent impairment duplicated in whole, or in part, the prior impairment rating of 20 percent left lower extremity permanent impairment.

In a September 18, 2020 report, Dr. Harris indicated that he had reviewed the case record and recounted that appellant was initially awarded 20 percent permanent impairment of the left lower extremity based on the accepted condition for left knee degenerative joint disease. He explained that both the 20 percent and 34 percent permanent impairment of the left lower extremity were for the same accepted condition of left knee osteoarthritis because the subsequent schedule award was provided after appellant underwent additional treatment for the accepted condition of left knee osteoarthritis, including left knee medial unicondylar arthroplasty. Dr. Harris reported that the 34 percent permanent impairment, in part, duplicated a portion of his prior award because "the 34 [percent permanent] impairment is also for the left knee osteoarthritis, however, as a result of having additional treatment including the surgeries, [appellant's] condition was now worsened and results in a greater impairment." Thus, he concluded that appellant had a total of 34 percent permanent impairment of the left lower extremity.

By decision dated September 21, 2020, OWCP corrected its September 18, 2018 decision to specifically find that appellant was granted a schedule award for an additional 14 percent permanent impairment of the left lower extremity, resulting in a total of 34 percent permanent impairment of the left lower extremity. The award ran for 40.32 weeks from June 6, 2017 through March 15, 2018.

On October 1, 2020 appellant, through counsel, requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review, which was held on January 15, 2021. Counsel argued that OWCP misinterpreted Dr. Harris' report and that the additional 34 percent was a new and different rating based on different conditions and treatment modalities.

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<sup>9</sup> On June 10, 2019 OWCP issued a preliminary overpayment determination that appellant received an overpayment of compensation in the amount of \$45,057.81 for the period March 16, 2018 through April 22, 2019 because it had been determined that he had less permanent impairment than previously awarded. By decision dated November 5, 2019, OWCP's hearing representative finalized the June 10, 2019 preliminary overpayment decision, finding that an overpayment was created because appellant received a schedule award for an additional 34 percent permanent impairment when he was only entitled to an additional 14 percent permanent impairment.<sup>9</sup> Appellant appealed to the Board. By decision dated July 8, 2020, the Board reversed the November 5, 2019 final overpayment determination, finding that OWCP had failed to establish that an overpayment of compensation had been created because the underlying schedule award issue was not resolved. It specifically noted that OWCP had failed to properly explain how the 34 percent permanent impairment of the left lower extremity awarded on September 18, 2018 duplicated in whole, or in part, the previous schedule award for 20 percent permanent impairment of the left lower extremity.

By decision dated March 24, 2021, the hearing representative affirmed the September 21, 2020 decision.

### **LEGAL PRECEDENT**

The schedule award provisions of FECA<sup>10</sup> and its implementing regulations<sup>11</sup> set forth the number of weeks of compensation payable to employees sustaining permanent impairment from loss or loss of use, of scheduled members or functions of the body. FECA, however, does not specify the manner in which the percentage of loss of a member shall be determined. For consistent results and to ensure equal justice under the law to all claimants, OWCP has adopted the A.M.A., *Guides* as the uniform standard applicable to all claimants and the Board has concurred in such adoption.<sup>12</sup> As of May 1, 2009, schedule awards are determined in accordance with the sixth edition of the A.M.A., *Guides* (2009).<sup>13</sup>

In determining impairment for the lower extremities under the sixth edition of the A.M.A., *Guides*, an evaluator must establish the appropriate diagnosis for each part of the lower extremity to be rated. With respect to the knee, the relevant portion of the leg for the present case, reference is made to Table 16-3 (Knee Regional Grid) beginning on page 509.<sup>14</sup> After the CDX is determined from the Knee Regional Grid (including identification of a default grade value), the net adjustment formula is applied using the GMFH, GMPE, and GMCS. The net adjustment formula is (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX).<sup>15</sup> Under Chapter 2.3, evaluators are directed to provide reasons for their impairment rating choices, including choices of diagnoses from regional grids and calculations of modifier scores.<sup>16</sup>

It is well established that benefits payable under 5 U.S.C. § 8107(c) are reduced by the period of compensation paid under the schedule for an earlier injury if: (1) compensation in both cases is for impairment of the same member or function or different parts of the same member or function; and (2) the latter impairment in whole or in part would duplicate the compensation payable for the preexisting impairment.<sup>17</sup>

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<sup>10</sup> 5 U.S.C. § 8107.

<sup>11</sup> 20 C.F.R. § 10.404.

<sup>12</sup> *Id.* at § 10.404; *E.S.*, Docket No. 20-0559 (issued October 29, 2020); *see also Jacqueline S. Harris*, 54 ECAB 139 (2002).

<sup>13</sup> *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5(a) (March 2017); *see also* Chapter 3.700.2 and Exhibit 1 (January 2010).

<sup>14</sup> *See* A.M.A., *Guides* (6<sup>th</sup> ed. 2009) 509-11.

<sup>15</sup> *Id.* at 515-22.

<sup>16</sup> *Id.* at 23-28.

<sup>17</sup> *See* 5 U.S.C. § 8108; 20 C.F.R. § 10.404(d); *J.H.*, Docket No. 15-1252 (issued January 19, 2016); *R.K.*, Docket No. 19-0247 (issued August 1, 2009).

OWCP's procedures provide that, after obtaining all necessary medical evidence, the file should be routed to a DMA for an opinion concerning the nature and percentage of impairment in accordance with the A.M.A., *Guides*, with the DMA providing rationale for the percentage of impairment specified.<sup>18</sup>

### ANALYSIS

The Board finds that appellant has not met his burden of proof to establish greater than 34 percent permanent impairment of his left lower extremity, for which he previously received a schedule award.

OWCP initially awarded appellant 20 percent permanent impairment of the left lower extremity. On October 31, 2016 appellant underwent left knee unicondylar arthroplasty. On May 15, 2017 he filed a Form CA-7 for an additional schedule award. In support of his claim, appellant submitted a June 6, 2017 report by Dr. Allen who noted that appellant's claim was accepted for left knee osteoarthritis. He referred to the A.M.A., *Guides* and utilized the DBI rating method to find that, under Table 16-3 (Knee Regional Grid), page 511, the CDX for status post tibial osteotomy with a poor result equated to a class 3 impairment with a default value of 37 percent. Dr. Allen assigned a GMFH of 2 and utilized the net adjustment formula,  $(2 - 3) = -1$ , which resulted in 34 percent permanent impairment of the left lower extremity.

In an April 20, 2018 report, Dr. Harris, serving as a DMA, reviewed Dr. Allen's June 6, 2017 impairment rating report and concluded that appellant had 34 percent permanent impairment of the left lower extremity under Table 16-3 (Knee Regional Grid), for the condition of status post unicondylar knee arthroplasty with a fair result. In an April 23, 2019 supplemental report, he indicated that because appellant, was previously awarded 20 percent permanent impairment for his left lower extremity, he was entitled to an increase of 14 percent permanent impairment for a total of 34 percent permanent impairment of the left lower extremity. Dr. Harris further explained that the subsequent 34 percent permanent impairment rating duplicated a portion of appellant's prior award because the impairment rating regarding appellant's left knee osteoarthritis was a result of appellant's additional treatment for left knee osteoarthritis, including left knee unicondylar arthroplasty.

The Board finds that Dr. Harris, serving as DMA, correctly applied the appropriate tables and grading schedules of the A.M.A., *Guides* to find that appellant had a total of 34 percent permanent impairment of the left lower extremity.<sup>19</sup> Dr. Harris also adequately explained that appellant was entitled to an increase of only 14 percent permanent impairment because appellant was previously awarded 20 percent permanent impairment for the same condition of left knee osteoarthritis.<sup>20</sup> The Board notes that the October 31, 2016 operative report noted a diagnosis of left knee arthritis. As the record contains no other probative, rationalized medical opinion that, supports that appellant had greater impairment of the left lower extremity based upon the A.M.A.,

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<sup>18</sup> See *supra* note 13 at Chapter 2.808.6 (March 2017). *R.M.*, Docket No. 18-1313 (issued April 11, 2019); *C.K.*, Docket No. 09-2371 (issued August 18, 2010).

<sup>19</sup> See *T.B.*, Docket No. 20-0642 (issued September 30, 2020).

<sup>20</sup> See *F.P.*, Docket No. 20-1646 (issued August 3, 2021).

*Guides*, he has not met his burden of proof to establish greater than 34 percent permanent impairment of the left lower extremity for which he received schedule award compensation.<sup>21</sup>

**CONCLUSION**

The Board finds that appellant has not met his burden of proof to establish greater than 34 percent permanent impairment of his left lower extremity, for which he previously received a schedule award.

**ORDER**

**IT IS HEREBY ORDERED THAT** the March 24, 2021 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: January 25, 2022  
Washington, DC

Alec J. Koromilas, Chief Judge  
Employees' Compensation Appeals Board

Janice B. Askin, Judge  
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Alternate Judge  
Employees' Compensation Appeals Board

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<sup>21</sup> See *V.S.*, Docket No. 19-1679 (issued July 8, 2020); *T.F.*, Docket No. 19-0157 (issued April 21, 2020).